IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2005-0066
Appellee,	)	DEPARTMENT A
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
DANIEL LEE BAKER,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20042647

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Gail Gianasi Natale — Phoenix
Attorney for Appellant

P E L A N D E R, Chief Judge.

¶1 Appellant Daniel Lee Baker was charged by indictment with aggravated driving while under the influence of an intoxicant (DUI) while his license was suspended or revoked or in violation of a restriction; aggravated driving with an alcohol concentration (AC) of .08 or greater while his license was suspended or revoked or in violation of a restriction; aggravated DUI with two or more prior DUI convictions within the sixty months preceding

this offense; aggravated DUI with an AC of .08 or greater with two or more prior DUI convictions during the sixty months preceding this offense; and criminal damage. The offenses were committed in April 2006. A jury found Baker guilty of all charges. After a bench trial on the state's allegation of prior felony convictions for sentence-enhancement purposes, the trial court found Baker had four aggravated DUI convictions in CR 2004-0488 and two aggravated DUI convictions in CR 2004-0490. The trial court sentenced Baker to concurrent, enhanced, presumptive prison terms of ten years for the DUI convictions and five years for the criminal damage conviction, to be served concurrently with the sentences imposed in CR 2004-0490 but consecutively to the terms in CR 2004-0488. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), raising no arguable issues but asking that we review the entire record for fundamental error. Baker has filed an extensive supplemental brief. We affirm.

¶2 Baker first contends his "indictment was not a true bill as no grand jury [had] convened[,] rendering the direct indictment and all charges void as fraudulent." The record on appeal includes a minute entry from the grand jury proceeding and the indictment. Thus, the record belies Baker's claim, and we summarily reject it. Moreover, to the extent Baker is claiming irregularity in the grand jury proceedings themselves, any challenge to the grand jury is, at this point, untimely and rendered moot by the convictions. *See State v. Agnew*, 132 Ariz. 567, 573, 647 P.2d 1165, 1171 (App. 1982); *see also United States v. Mechanik*,

475 U.S. 66, 72-73, 106 S. Ct. 938, 943 (1986) (guilty verdict by petit jury rendered harmless any conceivable error in grand jury's charging decision resulting from violation of federal rule); *State v. Verive*, 128 Ariz. 570, 574-75, 627 P.2d 721, 725-26 (1981) (defendant cannot raise on appeal issues relating to grand jury proceedings that did not affect subsequent trial). Baker's claim that the issue here relates to "subject-matter jurisdiction," which may be raised at any time, is unsupported and patently incorrect.

¶3 As we understand Baker's next argument, it is that the trial court erred by permitting the state to introduce evidence of his prior DUI convictions in his trial on these offenses and that he was unfairly prejudiced by the admission of this evidence. But the prior DUI convictions were elements of two of the aggravated DUI charges. Admission of the evidence was proper, and Baker was not entitled to a bifurcated trial on this element. *See State ex rel. Romley v. Galati*, 195 Ariz. 9, ¶ 16, 985 P.2d 494, 497 (1999); *see also* Ariz. R. Crim. P. Rule 19.1(b). During portions of his argument, Baker appears to be confusing prior convictions used to establish the elements of the offenses and prior convictions used to enhance his sentences pursuant to A.R.S. § 13-604. At other points in his argument, he appears to recognize that distinction. In any event, they are entirely distinguishable. The jury was required to find Baker had been convicted of two or more DUI offenses within the sixty months preceding two of the aggravated DUI offenses involved in this case in order to find him guilty of those charges. Contrary to Baker's suggestions in this argument and a separate argument, he was not entitled to have a jury determine the existence of the prior

convictions the state had alleged and the trial court had relied on to enhance his sentences. As Baker himself concedes during portions of his supplemental brief, the fact of prior convictions is excepted from the principles announced in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000), and its progeny. *See, e.g., Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004); *State v. Keith*, 211 Ariz. 436, ¶ 3, 122 P.3d 229, 229-30 (App. 2005); *State v. Cons*, 208 Ariz. 409, ¶ 10, 94 P.3d 609, 613 (App. 2004).

¶4 Baker also contends he "was denied his constitutional right to a preliminary hearing, before the due process ran its course, based on evidence that could have been introduced that would have changed the outcome of this case." Despite the fact that Baker apparently did not sign the waiver form he refers to in his supplemental brief, he did not challenge the process by which he was charged. Although he contends he could not demand a preliminary hearing because he had suffered serious injuries in the car accident he had been involved in when he committed these offenses, he nevertheless waived all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). We see no error, much less error that can be so characterized. In Arizona, a defendant may be charged by indictment, issued by a grand jury upon its finding that probable cause exists to believe the defendant committed the alleged offenses, or by information, filed after a finding of probable cause is made by a court. Ariz. Const., art. II, § 30; *see also* Ariz. R. Crim. P. 5.1, 13.1(c), 16A A.R.S. Although a defendant has certain

rights at a preliminary hearing that a defendant charged by indictment does not have, including the right to counsel, the right to challenge the state's evidence, and the right to present evidence, a defendant's equal protection rights are not violated by having been charged by indictment rather than by information after a preliminary hearing. *State v. Bojorquez*, 111 Ariz. 549, 553, 535 P.2d 6, 10 (1975). The use of either procedure satisfies the requirements of due process. *See generally State v. Neese*, 126 Ariz. 499, 502-03, 616 P.2d 959, 962-63 (App. 1980) ("The purpose of a preliminary hearing and a grand jury proceeding is the same. They are to determine whether there is probable cause to believe the individual committed an offense.").

¶5 Baker further contends that "all judicial parties . . . breached their statu[tor]y duty and obligation by not requesting a preliminary examination be performed to determine [his] competency" to stand trial in light of the fact that he faced three jury trials at about the same time, he had been in an accident and had suffered head injuries, and he had allegedly been assaulted when he was released from the rehabilitation center where he had been residing after his accident. The record on appeal does not support Baker's claim, and we summarily reject it. In the absence of any evidence to the contrary, we presume that neither defense counsel nor the trial court saw any reason to question Baker's competency to stand trial. *See* Ariz. R. Crim. P. 11.3(a), 16A A.R.S. (competency hearing only required "[i]f the court determines that reasonable grounds for an examination exist"); *State v. Kemp*, 185 Ariz. 52, 67, 912 P.2d 1281, 1296 (1996) (finding trial court did not abuse discretion by

failing sua sponte to order competency hearing pursuant to Rule 11.1 because defendant's statements did "not cast doubt on his ability to understand the nature of the proceedings . . . [or] indicate that he lacked the ability to assist in his defense"); *see also State v. Steelman*, 120 Ariz. 301, 315, 585 P.2d 1213, 1227 (1978); *State v. De Vote*, 87 Ariz. 179, 182, 349 P.2d 189, 192 (1960).[1]

¶6 We also reject Baker's claim that the "state lacked subject-matter jurisdiction to prosecute [him] for offenses committed within the boundaries of federal land." The charge of criminal damage was based on the damage to vegetation resulting from the accident and was supported by the testimony of a national park ranger. Defense counsel first raised this issue at trial by moving for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., 17A.R.S. At that time, neither the court nor counsel knew the answer to the question whether the state had jurisdiction to prosecute that offense, given that the damage occurred to federal property on federal land. Counsel reiterated the claim as to the criminal damage count after the close of evidence. The court commented: "Frankly, I suspect you're correct, but I'm going to leave that for another day, should Mr. Baker even be convicted of that offense, for a post-trial motion with memoranda to be filed." It does not appear the issue was raised again.

[1]Indeed, at sentencing, defense counsel commented that Baker "is a very intelligent man" with remarkable skills as a mechanic.

¶7 In any event, whether or not the issue was preserved for appellate review, Baker has not persuaded us that a Pima County sheriff's deputy lacked the authority to arrest Baker and that the state lacked the "subject matter jurisdiction to prosecute" him for the criminal damage charge or the remaining offenses, which he did not challenge below but does on appeal. "The burden of showing exclusive federal jurisdiction in a state court prosecution is on the defendant." *State v. Vaughn*, 163 Ariz. 200, 203, 786 P.2d 1051, 1054 (App. 1989).

> Generally, a state has complete jurisdiction over the lands within its exterior boundaries. There are three methods by which the United States can obtain exclusive jurisdiction over federal land within a state: (1) by reservation of exclusive federal jurisdiction upon the admission of a state into the Union with affirmation by the state; (2) by a state statute consenting to the purchase of land by the United States for one or more of the purposes enumerated in article 1, § 8, clause 17 of the United States Constitution; and (3) by a cession of jurisdiction to the United States by an individual state after statehood.

State v. Galvan-Cardenas, 165 Ariz. 399, 401, 799 P.2d 19, 21 (App. 1990) (citation omitted). The state alleged the offenses had occurred in Pima County, "part of the jurisdictional foundation for prosecution by an Arizona court." *State v. Verdugo*, 183 Ariz. 135, 138, 901 P.2d 1165, 1168 (App. 1995). Baker has not sustained his burden of establishing the state and, therefore, the court, lacked jurisdiction. *See id.; see also Galvan-Cardenas*, 165 Ariz. at 401, 799 P.2d at 21.

¶8 The DUI offenses were committed both on and off federal lands. The evidence established Baker had driven away from a convenience store on Sandario Road;

he had appeared to the store clerk to be intoxicated; he had stolen a "thirty pack" of beer from the store; he had driven away in a truck; and this same truck was the one found in the park by a sheriff's deputy, forty to sixty feet inside the boundary of the park. The park was five or six miles from the store. Baker does not contend the convenience store was on federal land; in fact, the evidence suggests the contrary. Having committed the DUI offenses off federal land as well as on federal land, Baker can hardly claim the state could not prosecute him for these offenses. *See* A.R.S. § 13-108 (listing circumstances in which state has jurisdiction over offense).

¶9 But regardless of whether the DUI offenses occurred partially on federal land, and even assuming Baker's criminal damage offense occurerd solely on federal land, Arizona has concurrent criminal jurisdiction over the particular federal land involved here. *See* A.R.S. § 37-620. In sum, Baker's jurisdictional argument is without merit.

¶10 In his last argument, Baker appears to be claiming his sentences violate various of his constitutional rights because he was sentenced as if he were a violent offender. He points to a number of instances during the sentencing hearing in which the prosecutor noted he was a danger to society and society needed to be protected from him. The prosecutor was simply referring to the irrefutable fact that Baker has repeatedly chosen to drink and drive and that it is fortunate no one had been hurt or killed. As appellate counsel and Baker have acknowledged, this appeal arises out of his third prosecution for aggravated DUI offenses. This court has affirmed his convictions and sentences in two other appeals involving those

charges. *State v. Baker*, No. 2 CA-CR 2004-0442 (memorandum decision filed Nov. 29, 2006); *State v. Baker*, No. 2 CA-CR 2004-0352 (memorandum decision filed Sept. 27, 2006). In this case, Baker was sentenced to presumptive, though enhanced, prison terms. The argument, including his claim that he was denied his right to a jury trial on the fact that he is a violent offender, is without merit; *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), is not implicated here. *See State v. Martinez*, 210 Ariz. 578, ¶ 17, 115 P.3d 618, 623 (2005) ("[U]nder Arizona law, the statutory maximum sentence for [*Blakely*] purposes in a case in which no aggravating factors have been proved to a jury beyond a reasonable doubt is the presumptive sentence."); *State v. Johnson*, 210 Ariz. 438, ¶ 12, 111 P.3d 1038, 1042 (App. 2005) ("[N]o constitutional violation occurs if the ultimate sentence falls within the range authorized by the jury verdict alone.").

¶11 We have reviewed the entire record for fundamental error and, having found none and having rejected the arguments raised in Baker's supplemental brief, affirm the convictions and the sentences imposed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

GARYE L. VÁSQUEZ, Judge